Office-Supreme Court, U.S.
FILED
MAY 16 1962
JOHN F. DAVIS, CLERK

No. ——

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 974

IN THE MATTER OF:

ART NATIONAL MANUFACTURERS DISTRIBUTING CO., LOUIS WATCH CO., LOUIS FRIEDMAN, MARTIN FRIEDMAN and ALBERT FRIEDMAN, Individually and as Officers of said Corporations,

Petitioners

vs.

FEDERAL TRADE COMMISSION

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

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No. _____

ART NATIONAL MANUFACTURERS DISTRIBUTING CO., INC., et al, *Petitioners*

vs.

FEDERAL TRADE COMMISSION,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Ben Paul Noble, attorney for petitioners, Art National Manufacturers Distributing Co., Inc., Louis Watch Co., Louis Friedman, Martin Friedman and Albert Friedman, prays that a writ of certiorari issue to review the order of the United States Court of Appeals For The Second Circuit on the 19th day of February, 1962, Affirming and Enforcing a Final Order of the Federal Trade Commission in Docket No. 7286 issued on May 16, 1961.

OPINION BELOW

The Opinion of the Court of Appeals (Appendix A) decided in Docket No. 27080 on January 26, 1962, is reported at 298 F.2(d) 476.

JURISDICTION

The United States Court of Appeals, Second Circuit, on January 26, 1962, entered its Opinion[1] on Petition to Review a Cease and Desist Order issued by the Federal Trade Commission in Docket No. 7286[2] on May 10, 1961.

The Court of Appeals entered its Final Decree Affirming and Enforcing Order to Cease and Desist[3] on February 9, 1962.

On application of petitioners, this Court acting through Mr. Justice Harlan on April 27, 1962, entered an Order extending time for filing this petition until May 15, 1962.[4]

The jurisdiction of this Court is invoked pursuant to Section 5 of the Federal Trade Commission Act. (15 U.S.C.A. 45, (g)(2), (h)).

QUESTIONS PRESENTED FOR REVIEW

1. Whether the pre-ticketed or suggested retail prices of a manufacturer's products are fictitious and consequently false, misleading and deceptive, where when sold at retail, they are sold at those prices, but where, when sold in large volumes through catalog distributors or discount merchants they are sold at substantially less than the pre-ticketed prices?

1(a). Whether the regular and usual prices at which a product is sold at retail can be established by discount sales?

1(b). Whether an order of the Federal Trade Commission requiring a customer to cease and desist generally from a pricing practice, is too broad in its scope if based solely upon evidence that products of a single manufacturer-supplier are sold by it at prices substantially less than that manufacturer's pre-ticketed prices?

2. Whether the substitution of hearing examiner after

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[1] Opinion, Appendix, "A."
[2] Final Order of F.T.C., Appendix "B"
[3] Final Decree, Appendix "C"
[4] Order extending, Appendix "D", and 28 U.S.C.A. 1254 and 2101(c).

2/3 of the witnesses have been heard is a denial of administrative due process of law?

2(a). Whether the Federal Trade Commission can substitute its findings and conclusions, based upon evidence heard by one examiner, since deceased, for those entered by the substituted examiner based upon evidence he has heard?

STATUTES INVOLVED

The statute involved in the determination of questions 1, 1(a) and 1(b), is Section 5 of the Federal Trade Commission Act (38 Stat. 711, as amended, 52 Stat. 111; 66 Stat. 632; 15 U.S.C.A. 45 (a), (b)).[5]

In determination of questions 2 and 2(a) the Administrative Procedure Act is involved, specifically 5 U.S.C.A. 1004(c), 1006(a) and 1006(c).[6]

STATEMENT OF THE CASE

The federal jurisdiction of the Court below was founded upon 15 U.S.C.A. 45 (b), (c) and (d).

The decree of the United States Court of Appeals (2nd Circuit) affirms and enforces[8] the final order[7] of the Federal Trade Commission modifying and adopting the Initial Decision of the Hearing Examiner.[8]

The Court's decree was entered on its opinion[9] after argument on Petition To Review.

At issue in the Court below on petition to review the agency order was the action of the Commission in striking the examiner's finding 14 and substituting its own. (Both are quoted in the Opinion of the Court and appear in the Initial Decision and Final Order of the Commission in the Appendix to this petition.)

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[5] In accordance with rule 23(d) of the Rules of this Court, the texts of 15 U.S.C.A. 45(a), (b) and 5 U.S.C.A. 1004(c); 1006(a) (c) are set forth in the Appendix hereto as Appendices "E", "F", "G", "H", and "I", respectively.

[6] *Ibid.* "G", "H" and "I".

[7] Appendix "C".

[8] Appendix "B".

[9] Appendix "J".

[10] Appendix "A".

The examiner's finding 14 concluded: "The allegations of the complaint relating to the pre-ticketing of watches with fictitious retail prices have not been sustained by the evidence." The Commission held:

> Under the circumstances of this matter where one family owns and controls the entire operation, respondents are in a poor position to deny that Louis watches are not pre-ticketed with fictitious prices, when they themselves regularly sell the watches to all comers at prices which are only a fraction of said pre-ticketed prices. Thus, we find that the hearing examiner's refusal to order all respondents to cease this practice was in error.

And substituted its own finding 14:

> All respondents have cooperated in the practice of misrepresenting by pre-ticketing and by other means that the regular retail prices of Louis watches are substantially higher than they in fact are.[10]

The Affirmed Final Order of the Commission would require petitioner, Art National, among other things, to cease and desist:[11]

* * * * * * *

> (b) Representing by means of prices on tickets attached to or accompanying *merchandise*, or by any other means, that any price is the retail price of *merchandise* when it is in excess of the price at which said *merchandise* is usually and customarily sold at retail. (emp. supp.)
>
> (c) Furnishing means and instrumentalities to dealers or others by and through which they may misrepresent the usual and customary retail prices of respondents' *merchandise*. (emp. supp.)

In addition, the Final Order of the Commission requires another petitioner, Louis Watch Co., to cease and desist (among other things):[12]

* * * * * * *

> (b) Representing by means of prices on tickets attached to or accompanying *merchandise*, or by any other means, that any price is the retail price of *merchandise* when it is in excess of the price at which said

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[10] Opinion of Court, Appendix "A".
[11] Final Order, Appendix "B".
[12] Final Order of the Commission, Appendix "B".

merchandise is usually and customarily sold at retail. (emp. supp.)

(c) Furnishing means and instrumentalities to dealers or others by and through which they may misrepresent the usual and customary retail prices of respondent's *merchandise*. (emp. supp.)

During hearings before examiners of the Commission, Mr. Calloway the original examiner heard the testimony of eight witnesses called in support of the complaint. He had received evidence at hearings held in New York and Chicago.[13]

Thereafter, Mr. Calloway died, and Mr. Creel the substituted examiner received evidence at hearings in Dayton, Cleveland, New York, Pittsburgh, Washington, D. C. and Los Angeles. He heard the testimony of the remaining agency witnesses (12) and the entire defense. (20 witnesses).[14]

During hearings, petitioners opposed the substitution of hearing examiner.[15]

Paragraph Six of the Complaint[16] alleges that "Respondents attach tickets to their *Louis Watches* setting forth prices. . . ." and Paragraph Seven alleges "by preticketing their *merchandise* with fictitious retail prices, respondents place in the hand of dealers and others, means and instrumentalities by and through which they may misrepresent the usual and customary retail prices of their *merchandise*." (emp. supp. in all instances.)[17]

There are no other allegations in the complaint relating to the alleged fictitious prices and petitioner's answers deny the allegations of paragraphs Six and Seven.

Creel, in his initial decision found:[18]

1. That both Art National and Louis Watch are corporations, the former doing business at Maspeth, Long

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[13] Original Record, official transcript of proceedings pp. 1-152.
[14] Original Record, official transcript of proceedings pp. 153-626.
[15] Appendix to Petitioners' Brief in Court of Appeals, p. 23a.
[16] Appendix to Petitioners' Brief, Court of Appeals, pp. 27a-32a.
[17] Complaint, Paragraphs Six and Seven, Appendix to Petitioners' Brief, Court of Appeals, p. 30a.
[18] Initial Decision, Appendix "J", this petition.

Island, the latter at 580 Fifth Avenue in New York City.

2. That the individual respondents are officers of the two corporations and formulate and control the policy of both, except that Martin Friedman does not participate in the formulation of Louis Watch policy. * * *

14. The evidence does not establish whether or not the suggested retail prices with which respondent, Louis Watch pre-ticketed its watches were the prices at which such watches were usually and customarily sold at retail. Those sold by Art National through its catalog were sold for substantially less than Louis Watches pre-ticketed prices and a number of peddlers and wholesalers sold them at retail l less than the pre-ticketed prices; but *all of the retailers* who operated retail jewelry stores, who were called as witnesses, *sold them at the suggested* resale or pre-ticketed prices. The evidence does not permit a determination that the usual or customary resale prices were less than the pre-ticketed prices, nor, does it permit a determination that the pre-ticketed prices were fictitious. (emp. supp.)

Mr. Creel then concluded that the allegations of Paragraphs Six and Seven of the Complaint had not been sustained, but that those contained in Paragraphs Four and Five (relating to practices other than pricing) had been.

On cross appeals to the Commission, that agency struck the examiners findings numbered 6, 12 and 14 and substituted its own findings: [19]

> 12. Art National and Louis Watch Co. represented that certain Louis Watches were shock-proof but they were not shock proof.
>
> 14. All respondents have cooperated in the practice of misrepresenting by pre-ticketing and by other means that the regular retail prices of Louis Watches are substantially higher than they in fact are.

All of the evidence adduced bearing upon the issues created by Paragraphs Six and Seven was heard by Mr. Creel, the substituted examiner. On the other hand, all other evidence was heard by Mr. Calloway. Mr. Creel did

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[19] Final Order, Appendix "B" this petition.

not hear any testimony bearing upon the practices of Art National. The only testimony adduced after his substitution for Mr. Calloway related to the practices of Louis Watch.[20]

Findings 1-13 of the Initial Decision are based upon evidence not heard by the finder of facts. Finding 14, based upon evidence received by him and witnesses he heard, was entered by Mr. Creel and formed the basis for the only conclusion by him entered favoring petitioners.

REASONS FOR GRANTING WRIT

1. The decision of the Court of Appeals here is in conflict with decisions of the Courts of Appeals in the District of Columbia,[21] in the 3rd Circuit,[22] 4th Circuit,[23] and 7th Circuit[24], all of which have recently decided different cases involving the issue of fictitious prices by pre-ticketing of products, but the combination of which is confusing to manufacturers generally and the watch industry in particular.

2. In deciding that, in the circumstances referred to in the Statement of Facts, the substitution of hearing examiners has not deprived petitioners of due process of law, the Court of Appeals has here decided an important question of federal law which has not yet been, and should be decided by this Court.

ARGUMENT

(Amplifying Reasons)

Fictitious Prices

The District of Columbia Circuit in *Allen V. Tornck* vs. *F.T.C.*, *supra*, affirmed an order of the Federal Trade Commission entered in Docket No. 6344, requiring a watch manu-

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[20] Footnotes 13 and 14, *supra*.

[21] *Allen v. Tornck* v. *F.T.C.*; 276 F.2(d) 513, affirming Final Order of the Commission in Docket No. 6344.

[22] *Bankers Security Corp.* v. *F.T.C.*; 297 F.2(d) 403.

[23] *Baltimore Luggage Co. v. F.T.C.*; 296 F.2(d) 608.

[24] *Clinton Watch Co.* v. *F.T.C.*; 291 F.2(d) 838.

facturer to cease and desist from supplying price tags in bulk to his customers leaving to them the discretion of selecting the retail price to be affixed to his watches.

In *Bankers Security Corp.* vs. *F.T.C.*, *supra*, the Third Circuit Court of Appeals held that the evidence supported finding that a store's advertisement comparing its price to regular or usual price was deceptive as implying reference to store's own prices, whereas the store had no usual or regular price for the product *even though the quoted higher prices prevailed in other stores in the area*, but that the order was too broad in its application to all stores owned or controlled by petitioner.

The Fourth Circuit, in *Baltimore Luggage Co.* vs. *F.T.C.*, *supra*, held that pre-ticketing by a manufacturer is not per se fictitious pricing, but where *37.5% in volume* of a manufacturer's products are sold at less than the pre-ticketed price an order to cease and desist was justified.

On the other hand, the Seventh Circuit in *Clinton Watch Co.* vs. *F.T.C.*, *supra*, affirmed an order of the Commission requiring a watch manufacturer to cease and desist from "fictitiously pre-ticketing its watches." There was no evidence in the *Clinton case*, as here, of a substantial volume of sales at the pre-ticketed price. Here the examiner found—and the Commission did not controvert his finding—that when sold at retail by retail jewelers petitioner's watches are sold at the pre-ticketed prices.[25] There the ticket affixed was found to be "substantially in excess of the normal and usual retail price."

This Court has not yet, and should decide when a manufacturer's pre-ticketed prices are fictitious.[26]

Here there is no finding as to the relative volume of sales at less than the pre-ticket price. In substituting its finding

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[25] Finding 14, *supra* (quoted in Statement of the Case).

[26] See also: *Ninosk Industries* v. *F.T.C.*, 278, F.2d 337; *Hanson Distributors, Inc.* v. *F.T.C.*, 263, F.2d 396; *The Fair* v. *F.T.C.*, 272, F.2d 699; *Mandel Bros. Inc.* v. *F.T.C.*, 254, F.2d 18.

for that of the Examiner's No. 14, the Commission merely stated that "all respondents have cooperated in the practice of misrepresenting by pre-ticketing."

The Opinion of the Commission[27] dwelling at great length on the facts leading to its conclusion that family ownership of two distinct corporations establishes a conspiracy where one is a supplier to the other, the latter selling at less than the former's pre-ticketed prices.

But, as re-cited both in the Initial Decision and Opinion of the Commission (*supra*), all of Art National's sales are through its catalog and it always sells at a discount from its manufacturers' listed or pre-ticketed retail prices.

The confusion arises when a manufacturer attempts to devolve a rule of reason out of the cases here referred to decided by various courts of appeals.

Clearly the public is better protected by a manufacturer who lists his suggested prices and pre-tickets his products with corresponding price tags. (*Tornek* vs. *F.T.C.*, *supra* and *Baltimore Luggage Co.* vs. *F.T.C.*, *supra*)

But when he pre-tickets his products, the prices must not be in excess of the normal and usual prices at which they are sold at retail. (*Clinton Watch* vs. *F.T.C.*, *supra*.)

Does this mean that a manufacturer who has lost control of selling price after his product leaves the factory must ticket his products after sampling his selling market to determine the prices at which they are actually sold? The impossibility of so doing suggests itself.

Should he then, disclaim from listing or pre-ticketing until a price is established for each item? Watches are by force of competition projected for the market from year to year. They are channeled through economic distribution into varying geographic and merchandising areas. Consequently, such a policy would lead ultimately into even greater confusion of the public and producer bewilderment. Different prices would be established in differing distribution areas and by the time each would be clearly established

[27] Annexed to Final Order, Appendix "B", this petition.

the next years production would be on hand for similar price evaluation. In the meantime, the manufacturer would be confronted with the dangers inherent in *Allen J. Torneck* v. *F.T.C. (supra)* since it might be reasoned from the ruling there that failure to pre-ticket or unpriced distribution is, per se, placing a means or instrumentality into the hands of others to deceive the public and an unfair trade practice.

On the other hand, under the decision of the Third Circuit in *Bankers Security Corp.* v. *F.T.C.*, any manufacturer's list or pre-ticketed retail price may be fictitious, and consequently false, misleading and deceptive *if it is not the price at which the product is usually and regularly sold by each specific customer.*

It is manifest that quality control and the customers' vested interest in the manufacturer estimate in advance of a year to year distribution of his product's value require that a manufacturer pre-ticket and list unit prices. The Clinton Watch case makes it clear that it should not be an exaggerated estimate of ultimate selling price.

These two general concepts provide the black and white. But it is in the grey area, expansive between the two that the Court's attention is required.

It is submitted that *intent to deceive*, that is a showing of knowledge that the product will not usually sell at the pre-ticketed price may provide the needed answer. Such a showing was not here made and, indeed, the evidence here [28] negated such intent and establishes (1) that Louis Friedman acting for Louis Watch, established listed and pre-ticket prices as a means of quality control, based upon cost, demand and comparison with competitive products, and (2) that Art National, a distinct though identically owned corporation, arrived at its selling price of all products sold through its distributed catalog, by printing (showing) the discount between manufacturers listed and manufacturers

[28] Appendix to Petitioner's Brief, Court of Appeals, pp. 33a-54a.

wholesale prices as furnished to it by all of its suppliers.

We urge then that only this Court can resolve the economic chaos inherent in the differing cases cited and the conflict of the decision of the court below here with all and each of those cases, all deciding the same issue.

SCOPE OF THE ORDER

As will be noted by reading the extracts from the Commissions Order quoted above in the Statement of the Case, the Commission would require Art National to cease and desist with respect to pre-ticketing all merchandise sold by it.

The complaint (Paragraphs Six and Seven) alleged a fictitious price practice only with reference to the sale of Louis Watches.[29] There is absolutely no evidence that any of the many products sold by Art National through its catalog (other than Louis Watches, *arguendo*) are sold at less than the pre-ticketed prices. Yet, the affirmed and enforceable order extends to *all merchandise*.

Petitioners submit that the order is, on its face, in conflict with a recent case decided by this Court,[30] as well as with the decision in the Third Circuit in the Bunker Securities Corp. case, *supra*.

Petitioners therefore urge that the Order here be modified pursuant to the cited authorities with which it is in conflict and limited to watches only insofar as Art National is subject to its mandate.

SUBSTITUTE EXAMINER

Petitioners urge that the substitution of Mr. Creel after Mr. Calloway had heard all of the evidence relating to Art National (none of which was heard by him) was arbitrary

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[29] Appendix to Petitioner's Brief, Court of Appeals p. 30a

[30] *F.T.C. v. Henry Broch & Co.*; (October Term, 1961), decided Jan. 15, 1962; Supreme Court, Docket 74

and capricious and the Court of Appeals in deciding it was not in conflict with the standing decision of this Court[31] and with the decision of a court in another Circuit deciding the same issue in another manner.[32]

If the decision of the court below is not in conflict with jurisdic reasoning from those two decided cases, then the issue presented is novel, of great moment and should be decided by this Court.

The impact of witnesses on the actual trier of fact could never be more clearly demonstrated than here where the finding examiner found for petitioners on the only issue on which he heard testimony,[33] but found on the record that the allegations of the complaint had been sustained with respect to all of the issues upon which he had heard no testimony.[34]

In reversing the examiner, the Commission went to a portion of the record containing testimony that was heard by Mr. Calloway, whom he had succeeded after death.[35]

We submit that the examiners judicious reaction to the evidence here dramatically places this case within the rule of the Gamble-Skogmo case, *supra*, relied upon by the Commission in its Opinion and, we urge, not properly applied by the Court below.[36]

We submit that administrative due process of law under the Administrative Procedure Act[37] has been denied petitioners here. In addition, we urge, that the demonstrated possibility of error in such a policy of substitution is, in these circumstances, contrary to the letter and spirit of the

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[31] *Universal Camera Corp. v. N.L.R.B.*; 340 U.S. 474.

[32] *Gamble-Skogmo Inc. v. F.T.C.* (8 Cir.) 211 F 2d 106.

[33] Initial Decision, Finding 14, Appendix "J", this petition.

[34] Initial Decision, Findings 1-13, Appendix "J", this petition. See also footnotes 13 and 14 for original record references to transcript.

[35] Opinion of the Commission, Annexed to Final Order, Appendix "B", this petition.

[36] Opinion of Commission, Appendix "B". Opinion of Court below, Appendix "A", this petition.

[37] Administrative Procedure Act, 5 U.S.C.A. 1004(c), 1006(a)(c), Appendices "G," "H," "I" respectively, this petition.

legislative prescription of unfair trade practices in the public interest."[35]

There is further substance in this record to sustain the petitioners argument here.

1. The examiner had found that Art National misrepresented the length of time it had been in business, he had heard none of the evidence bearing upon this issue. The Commission reversed his finding.[36]

> 2. "The complaint charges and the examiner found that respondent Louis Watch Company, Inc., represented that its watches carried a 'full years written guarantee,' without disclosing in the advertisements or in the guarantee certificate furnished to purchasers the manner in which the guarantor would perform. But the hearing examiner, after having made the finding, failed to include a prohibition of the practice within his order to cease and desist. Our examination of the record indicates that the finding is based upon substantial evidence and we can only conclude that the omission of an appropriate prohibition in the order was an unintentional oversight. Thus the appeal of complaint counsel on this point should be granted and an appropriate order will issue.
>
> Although neither party has raised the point, it appears that numbered paragraph three of the order against Art National and its officers is unsupported by a factual finding. This deficiency is not the result of a failure of proof since the amended answer of Art National admits making the representation that Louis watches are shockproof. The proposed findings submitted on behalf of all respondents admit that the watches are, in fact, not shock proof. Thus it appears that here also the absence of an appropriate finding in the initial decision with respect to Art National is the result of an oversight. Therefore the initial decision will be modified by adding a finding that Art National has falsely represented that Louis watches are shock proof."

Petitioners urge that this record clearly establishes the

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[35] Federal Trade Commission Act, 15 U.S.C.A. 45(a) and cf. Appendices "E", and "F", respectively, this petition.

[36] Final Order, 2nd paragraph Appendix "B", this petition.

hazard of substituting hearing examiners after hearings have progressed well into the evidence.

The credibility of the individual respondent who testified[40] must have weighed heavily in the examiner's evaluation of the evidence he had heard. He did not hear their testimony on issues that were decided by him unfavorably to them, and he was in no position whatsoever to evaluate the testimony of eight witnesses whose testimony formed the record basis for 13 of the 14 findings he entered.[41]

We submit that the findings entered reveal the force of credibility on a jurist at the hearing level, and that this Court should either decide the issue here raised as novel and important or should find it, as affirmed by the Court below, in conflict with the decisions above referred to and, accordingly, reverse the order of the Court of Appeals and remand the matter for further proceedings de novo before a duly designated examiner who will hear all of the evidence and propose findings based upon the record and his determination of the credibility of witnesses.

CONCLUSIONS

That this Petition For A Writ of Certiorari To The Second Circuit Court in its Docket No. 27080, No. 147, September Term, 1961, be granted.

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[40] Original Record, official transcript of proceedings, pp. 372-432A, 597-625, 18-32, 32-69, 265-273.

[41] *Ibid*, pp. 1-152.

Respectfully submitted,

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APPENDIX "A"

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 147—September Term, 1961.

(Argued January 4, 1961 Decided January 26, 1962.)

Docket No. 27080

In the Matter of

ART NATIONAL MANUFACTURERS DISTRIBUTING CO., LOUIS WATCH CO., LOUIS FRIEDMAN, MARTIN FRIEDMAN and ALBERT FRIEDMAN,

Petitioners.

—against—

FEDERAL TRADE COMMISSION,

Respondent.

Before:

WATERMAN, KAUFMAN and MARSHALL,

Circuit Judges.

On petition for review of an order to cease and desist issued by the Federal Trade Commission. Affirmed and Enforced.

BEN PAUL NOBLE, Washington, D. C. (Noble & Moyle, Washington, D. C., of counsel), *for petitioners.*

JNO. W. CARTER, JR., Attorney, Federal Trade Commission, Washington, D. C. (James McI. Henderson, General Counsel, J. B. Truly, Asst. General Counsel, on the brief), *for respondent.*

PER CURIAM:

Petitioners ask this Court to review and set aside an order of the Federal Trade Commission issued May 10, 1961, directing Art National Manufacturers Distributing Co., Inc., Louis Watch Company, Inc., corporations, and Louis Friedman, Martin Friedman and Albert Friedman, individually and as officers of said corporations, to cease and desist from certain unfair and deceptive acts in violation of the Federal Trade Commission Act.[1]

Order Affirmed and enforcement ordered.

The Federal Trade Commission heard this matter on cross-appeal from the hearing examiner's initial decision partially upholding and partially dismissing the complaint. The petition seeks review of the action of the Commission in striking finding 14 of the hearing examiner's initial decision and substituting therefor its own finding.

The examiner's finding 14 concluded: "The allegations of the complaint relating to the pre-ticketing of watches with fictitious retail prices have not been sustained by the evidence." The Commission held:

> "Under the circumstances of this matter where one family owns and controls the entire operation, respondents are in a poor position to deny that Louis watches are not pre-ticketed with fictitious prices when they themselves regularly sell the watches to all comers at prices which are only a fraction of said pre-ticketed prices. Thus, we find that the hearing examiner's refusal to order all respondents to cease this practice was in error."

[1] The pertinent provisions of the Act are—

Sec. 5(a)(1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful. 15 U. S. C. A. §45 (a)(1).

Sec. 5(a)(6) The Commission is empowered and directed to prevent persons, partnerships, or corporations * * * from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce. 15 U. S. C. A. §45(a)(6).

Sec. 5(c) * * * findings of the Commission as to the facts, if supported by evidence, shall be conclusive. 15 U. S. C. A. §45(c).

And substituted its own finding 14:

> "All respondents have cooperated in the practice of misrepresenting by pre-ticketing and by other means that the regular retail prices of Louis watches are substantially higher than they in fact are."

Petitioners contend that the Commission was without power to strike finding 14 of the examiner and substitute its own finding. Petitioners' reliance upon *Universal Camera Corp.* v. *N. L. R. B.*, 340 U. S. 474 (1951) is misplaced. That case does not require absolute adherence to the examiner's findings. Rather, the decision seeks to place the examiner's findings in proper perspective within the entire record. In such cases, "the pattern and framework of the whole enterprise must be taken into consideration." *Goodman* v. *Federal Trade Commission*, 244 F. 2d 584, 601 (9 Cir. 1957). The Commission's finding, being supported by substantial evidence, is conclusive upon us.

After three days of hearing during which the testimony of eight witnesses was heard, the initial hearing examiner died, and a substitute hearing examiner was appointed to conclude the hearings. Petitioners contend the Commission's ruling on finding 14 was based on testimony of witnesses not heard by the substitute hearing examiner, thus raising a question of credibility governed by *Gamble-Skogmo, Inc.* v. *Federal Trade Commission*, 211 F. 2d 406 (8 Cir. 1954). But in *Gamble-Skogmo*, the substitute examiner was appointed after all the evidence was in, and his findings on conflicting testimony was admittedly based on credibility. In this case, the Commission made its findings on "uncontroverted" evdence not involving credibility. Moreover, the substitute examiner offered petitioners the opportunity to recall any witnesses heard by the first examiner for either "additional cross, or for further cross." This they declined to do. For similar reasons petitioners' attack on the remaining findings must fail. The record as a whole supports the Commission.

The order is affirmed and an enforcement decree will be entered.

APPENDIX "B"

FINAL ORDER

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

Docket 7286

Commissioners:

PAUL RAND DIXON, *Chairman*.
ROBERT T. SECREST.
SIGURD ANDERSON.
WILLIAM C. KERN.
PHILIP ELMAN.

This matter having been heard by the Commission on cross-appeals by respondents and counsel supporting the complaint; and the Commission having rendered its decision denying in part and granting in part both appeals and having determined, for the reasons stated in the accompanying opinion, that the initial decision should be modified:

IT IS ORDERED that the initial decision of the hearing examiner be modified by striking therefrom findings 6, 12 and 14, and by substituting in place of the stricken findings 12 and 14 the following:

12. Art National and Louis Watch Company represented that certain Louis watches were shockproof, but they were not shockproof.

14. All respondents have cooperated in the practice of misrepresenting by pre-ticketing and by other means that the regular retail prices of Louis watches are substantially higher than they in fact are.

Final Order

It Is Further Ordered that the following order be substituted for the order contained in the initial decision:

It Is Ordered that respondent Art National Manufacturers Distributing Co., Inc., a corporation, and respondents Louis Friedman, Martin Friedman and Albert Friedman, individually and as officers of said corporation, and their agents, representatives and employees, directly or through any corporate or other device, in connection with the sale or distribution of merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

(a) Representing, directly or indirectly:

1. That respondents occupy any portion of buildings depicted that is not in accordance with the facts, or misrepresenting, in any manner, the size or extend to fthe buildings in which they carry on their business:

2. That respondent Art National Manufacturers Distributing Co., Inc., sells its merchandise at America's lowest prices, or misrepresenting in any other manner its prices as compared to those of its competitors:

3. That Louis watches are shockproof.

(b) Representing by means of prices on tickets attached to or accompanying merchandise, or by any other means, that any price is the retail price of merchandise when it is in excess of the price at which said merchandise is usually and customarily sold at retail.

(c) Furnishing means and instrumentalities to dealers or others by and through which they may misrepresent the usual and customary retail prices of respondents' merchandise.

It Is Further Ordered that respondent Louis Watch Company, Inc., a corporation, and respondents Louis Friedman and Albert Friedman, individually and as officers of said corporation, and their agents, representatives and employees, directly or through any corporate or other device, in connection with the sale

or distribution of merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from;

(a) Representing directly or indirectly:

1. That said corporation has been in existence, or that said corporation or individuals have been in business for any period or length of time that is not in accordance with the facts;

2. That they occupy any portion of buildings depicted that is not in accordance with the facts, or misrepresenting, in any manner, the size or extent of the buildings in which they carry on their business;

3. That Louis watches have been awarded a Gold Medal or any other kind of medal;

4. That the jewels in Louis watches are rubies;

5. That Louis watches are shockproof;

6. That Louis watches are guaranteed unless the nature and extent of the guarantee and the manner in which the guarantors will perform are clearly set forth.

(b) Representing by means of prices on tickets attached to or accompanying merchandise, or by any other means, that any price is the retail price of merchandise when it is in excess of the price at which said merchandise is usually and customarily sold at retail.

(c) Furnishing means and instrumentalities to dealers or others by and through which they may misrepresent the usual and customary retail prices of respondents' merchandise.

It Is Further Ordered that the initial decision, as so modified, be, and it hereby is, adopted as the decision of the Commission.

It Is Further Ordered that the respondent shall, within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in

detail the manner and form in which they have complied with the order to cease and desist.

By the Commission. Commissioner Elman not participating.

JOSEPH W. SHEA,
Secretary.

Issued: May 10, 1961

(SEAL)

OPINION OF THE COMMISSION

UNITED STATES OF AMERICA

BEFORE FEDERAL TRADE COMMISSION

Docket 7286

Commissioners:

PAUL RAND DIXON, *Chairman.*
ROBERT T. SECREST.
SIGURD ANDERSON.
WILLIAM C. KERN.
PHILIP ELMAN.

By DIXON, *Commissioner:*

The complaint in this proceeding was issued October 24, 1958. In it the respondents are charged with having made false, misleading and deceptive statements or representations in promotional material in connection with the interstate sale of a wide variety of goods including watches. It is alleged that these practices violate Section 5 of the Federal Trade Commission Act.

After an answer had been filed the respondents changed counsel and upon request were granted permission to file

new and somewhat different answers. Issue having been joined the matter proceeded to hearing. After three days of hearings during which the testimony of eight witnesses was heard, the hearing examiner became fatally ill and on July 2, 1959, a substitute hearing examiner was appointed in his stead.

On July 28, 1959, we denied respondents' interlocutory appeal from the order replacing the hearing examiner on the ground that respondents had failed to show that their right to a full and fair hearing had in any manner been prejudiced by the substitution. Hearings in suport of and in opposition to the complaint were then held in several cities throughout the country culminating in New York City on June 28, 1960.

The hearing examiner's initial decision partially upholding and partially dismissing the complaint was filed on October 27, 1960. The proceeding is before us on cross-appeals by respondents and counsel supporting the complaint. The appeal of counsel supporting the complaint makes two assignments of error while respondents plead that the hearing examiner erred in nine of his findings and charged further errors in five legal questions.

Respondent Art National Manufacturers Distributing Co., Inc., is a "catalog mail order house," selling a sundry line of hard goods to consumers and occasionally to retailers. This proceeding is almost entirely concerned with alleged false and deceptive representations made in the Art National catalog distributed to more than 400,000 addressees.

Louis Watch Company, Inc., is a manufacturer and distributor of watches. A substantial part of its total sales are made through the medium of Art National. Several of the specific charges against this respondent involve its advertising appearing in the Art National catalog while others deal with practices engaged in while distributing watches through other media.

The two corporate respondents are of a type commonly referred to as "family" corporations. They are completely

owned and managed by the Friedman family and three of the members of that family, the father and two sons, are named as party respondents. The evidence clearly indicates interlocking control and management of the two corporations through the medium of common officers.

The respondents admit that respondent Louis Friedman "owns" and "runs" respondent Louis Watch Company, Inc., and that respondent Albert Friedman manages and formulates the policy of respondent Art National Manufacturers Distributing Co., Inc. They deny that respondent Martin Friedman has any authority or control in either corporation. The evidence shows that Martin Friedman owns 25% of the stock of Art National; that he was its vice-president when it was incorporated, and that his brother Albert was "not too sure" that he was still the vice-president at the time of hearing. These might be rather tenuous grounds for holding Martin Friedman as a party respondent but we do not have to rely on them alone. Mr. Louis Friedman, the father of Albert and Martin, when asked whether he and his two sons owned and ran Art National testified: "Art National, yes. Well, they actually run it, to be more specific." This statement allays any question of Martin Friedman's responsibility for the opperation of respondent Art National and with it any doubt concerning his being a proper party to this proceeding.

Several of respondents' assignments of error can be disposed of without extended discussion since they have been met with such frequency in the past that their solution presents no problem for which a clear and controlling precedent has not been established. One such plea is respondents' claim that they have discontinued or abandoned several of the practices indicted by the complaint and have no intention to again engage in them. To resolve such questions we generally look to the timing and circumstances surrounding the alleged discontinuance. In this case if is admitted that the practices were not discontinued until the Commission attorney investigating this matter informed

respondents of their questionable nature. Such discontinuance after the commencement of proceeding will not support a conclusion or give assurance that the practices will not be resumed, and under such circumstances we have consistently refused to dismiss complaints. E.g., *Ward Baking Company*, 54 F.T.C. 1919 (1958); *Arnold Constable Corporation*, Docket No. 7657 (January 12, 1961). Respondents here have presented no grounds which would justify our departure from past holdings and we accordingly reject their plea of abandonment.

Another of respondents' pleas which appears to fly in the face of established precedent is the contention that the substitution of hearing examiners during the course of the hearing had the effect of denying them a fair trial. They urge that the replacement hearing examiner did not hear the testimony of all witnesses and may not make findings which are to any extent based upon testimony not offered in his presence. Respondents cite no legal precedent for this proposition, for indeed there is none. A leading case on this point is *Gamble-Skogmo, Inc. v. Federal Trade Commission*, 211 F.2d 106 (8th Cir. 1954). In that case a substitute hearing examiner was appointed when his predecessor became unavailable after all testimony had been received and briefs and oral argument received and heard. On appeal from the Commission's order to cease and desist the court of appeals made a rather detailed analysis of the evidence and concluded that the initial decision of the substitute hearing examiner was: "* * * based in controlling measure upon the credibility evaluation which he made between the opposing witnesses in their irreconcilable testimony." (Id. at 117-118) The court set aside the order of the Commission holding that the Commission had not complied with the provisions of Section 5(c) of the Administrative Procedure Act (5 U.S.C.A. § 1004(c)), which provides in part:

> "The same officers who preside at the reception of evidence * * * shall make the recommended decision

or initial decision * * * except where such officers become unavailable to the agency."

In ruling against the Commission, the court decided that even when a hearing examiner had become "unavailable" a substitute hearing examiner could not decide the case unless:

> "* * * it fairly could be said that a credibility evaluation from hearing and seeing the witnesses testify was unnecessary, in the sense that a direct choice in personal credibility as between them would not have to be made or would not from the nature of the situation be capable of being of material assistance, in the attempt of the substitute examiner to arrive at the controlling facts." (Id. at 115)

To bring themselves within the rule of the *Gamble-Skogmo* case respondents would have to show that the hearing examiner based his findings upon the contradicted testimony of witnesses which he had not observed testifying. While it is true that the substitute hearing examiner did not hear the testimony of eight witnesses (including two of the individual respondents) respondents do not challenge the credibility of these witnesses or point to any irreconcilable conflict between their testimony and other evidence. A further defect in respondents' plea is the failure to show that the findings and decision of the hearing examiner were based to any extent upon the testimony of the unobserved witnesses. Thus, we conclude that respondents have totally failed to show that the substitution of hearing examiners in any way prejudiced their right to a fair trial.

Both corporate respondents are charged with misrepresenting the time they have been in business. Louis Watch Company advertised that it has been in business since 1904 and there doesn't appear to be any question but that this representation is completely false. The situation with Art National is different. This company represented in its 1956-57 catalog as follows:

> "For 32 years Art Narrow has been the choice of progressive dealers * * *."

The complaint alleged that this statement was false and that respondent "* * * was not incorporated until 1951."

The hearing examiner ordered respondent Art National to cease representing that it had been in business for any period of time "* * * that is not in accordance with the facts; * * *." Let us briefly examine just what the record facts are with respect to this charge.

The respondent in its answer freely admitted that it had represented that Art National had been in business for thirty two years and also admitted that it was not incorporated until 1951. It is specifically denied that its representations as to the length of time which it had been in business were false. Absolutely the only evidence adduced in support of the complaint on this point consists of the testimony of the principal officer and founder of Art National, Mr. Louis Friedman. The witness testified as follows:

> "I formed Art Watch Company in 1927 and Art National was reincorporated, I believe, in '51, under the Art National Manufacturing and Distributing Company."

There can be no doubt that the above-quoted testimony and the admissions in the respondents' answer are an insufficient basis upon which to predicate a finding that this respondent has not been in business for thirty-two years. Findings of fact must be supported by "reliable, probative, and substantial evidence." (Section 7(c), Administrative Procedure Act.) The evidence on this point does not fulfill any of these requirements. The burden was on complaint counsel to prove that this respondent had not been in business" for 32 years. And this burden is not satisfied by a showing of incorporation (or "reincorporation") in 1951. Therefore, on this point we find that the hearing examiner's finding and order are not supported by the record and must be vacated.

The complaint charges and the examiner found that respondent Lorus Watch Company, Inc., represented that its

watches carried a "full years written guarantee" without disclosing in the advertisements or in the guarantee certificate furnished to purchasers the manner in which the guarantor would perform. But the hearing examiner, after having made the finding, failed to include a prohibition of the practice within his order to cease and desist. Our examination of the record indicates that the finding is based upon substantial evidence and we can only conclude that the omission of an appropriate prohibition in the order was an unintentional oversight. Thus the appeal of complaint counsel on this point should be granted and an appropriate order will issue.

Although neither party has raised the point, it appears that numbered paragraph three of the order against Art National and its officers is unsupported by a factual finding. This deficiency is not the result of a failure of proof since the amended answer of Art National admits making the representation that Louis watches are shockproof. The proposed findings submitted on behalf of all respondents admit that the watches are, in fact, not shockproof. Thus it appears that here also the absence of an appropriate finding in the initial decision with respect to Art National is the result of an oversight. Therefore the initial decision will be modified by adding a finding that Art National has falsely represented that Louis watches are shockproof.

The hearing examiner refused to find that the suggested retail prices with which respondent Louis Watch Company pre-ticketed its watches were fictitious and higher than the prices at which watches were usually sold at retail. As he points out, the evidence on this point is conflicting but we do not agree with his further conclusion that the evidence as a whole does not permit a determination that the pre-ticketed prices were fictitious.

As pointed out above, a substantial number of Louis watches are sold to consumers through the medium of the Art National catalog. Louis Friedman, the president of both Art National and Louis Watch Company, in total contrast

respect to the Louis watches handled by Art National: "Sure. They handle the same thing as any other customer." He further testified with respect to the manner in which he, as president of Louis Watch Company, dealt with Art National:

Q. It is the only catalog distributor that Louis Watch sells to at the present time? A. Right.

Q. And you do not furnish them with a separate price list? A. They are the same as anybody else.

Q. Do they carry the same price tags as the watches that are distributed to the — A. Yes. Everything is the same. Everything is uniform, no different.

Q. They establish their own coded price? A. Yes.

The record clearly shows that the price lists furnished to Art National and other by Louis Watch Company contain suggested retail prices; that these suggested prices correspond with the prices on the tickets attached to the watches and the the "retail" prices listed in the Art National catalog.

The evidence is uncontroverted that the prices charged consumers by Art National (the "coded" price referred to in the quote above) were substantially below the suggester retail list, and corresponding ticket, price fixed by Louis Watch Company. In some cases the price regularly charged was equal to less than 25% of the suggested retail or pre-ticketed price.

Under the circumstances of this matter, where one family owns and controls the entire operation, respondents are in a poor position to deny that Louis watches are not pre-ticketed with fictitious prices when they themselves regularly sell the watches to all comers at prices which are only a fraction of said pre-ticketed prices. Thus, we find that the hearing examiner's refusal to order all respondents to cease this practice was in error.

On our review of the entire record we find that respondents have been afforded a fair hearing and the findings of the hearing examiner except as vacated by this opinion

are supported by reliable and substantial evidence. An appropriate order to cease and desist, modified to conform with this opinion, will issue.

Commissioner Elman did not participate in the decision of this matter.

May 10, 1961

APPENDIX "C"

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

ART NATIONAL MANUFACTURERS DISTRIBUTING CO., INC., a corporation, LOUIS WATCH COMPANY, INC., a corporation, and LOUIS FRIEDMAN, MARTIN FRIEDMAN, and ALBERT FRIEDMAN, individually and as officers of said corporation,

Petitioners,

v.

FEDERAL TRADE COMMISSION,

Respondent.

Docket No. 27080

DECREE AFFIRMING AND ENFORCING ORDER TO CEASE AND DESIST

Art National Manufacturers Distributing Co., Inc., Louis Watch Company, Inc., corporations, and Louis Friedman, Martin Friedman, and Albert Friedman, individually and as officers of said corporations, petitioners, having filed in this Court on the 15th day of July, 1961, a petition for review of and to set aside an order to cease and desist issued against them on the 10th day of May, 1961, by the Federal Trade Commission, respondent, in a proceeding before it entitled "In the Matter of Art National Manufacturers Distributing Co., Inc., a corporation, Louis Watch

Company, Inc., a corporation, and Louis Friedman, Martin Friedman, and Albert Friedman, individually and as officers of said corporations, Docket No. 7286"; and a copy of said petition having been served upon the Commission; and the Commission having thereafter certified and filed in this court, as required by the Federal Trade Commission Act, a transcript of the entire record in the proceeding which resulted in the said order to cease and desist; and the matter having been heard by this Court on briefs and oral argument and this Court having thereafter, on the 26th day of January, 1962, rendered its decision affirming the order to cease and desist issued on the 10th day of May, 1961, as aforesaid, and directing that the said order be enforced:

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed that the prayer of the aforesaid petition to set aside the order of the Federal Trade Commission be, and it hereby is, denied:

It Is Further Ordered, Adjudged and Decreed that the said order to cease and desist be, and it hereby is, affirmed, and that petitioners Art National Manufacturers Distributing Co., Inc., Louis Watch Company, Inc., corporations, and Louis Friedman, Martin Friedman, and Albert Friedman, individually and as officers of said corporations be, and they hereby are, commanded forthwith to obey and comply with the terms thereof;

It Is Further Ordered, Adjudged and Decreed that within ninety (90) days after the entry of this decree, Art National Manufacturers Distributing Co., Inc., Louis Watch Company, Inc., corporations, and Louis Friedman, Martin Friedman, and Albert Friedman, individually and as officers of said corporations, shall file with the Federal Trade Commission a report in writing, setting forth in detail the manner and form in which they have complied with the said order to cease and desist issued as aforesaid and hereby affirmed and enforced:

Without prejudice to the right of the United States, as provided in Section 5(1) of the Federal Trade Commission Act, to prosecute suits to recover civil penalties for viola

tion of the aforesaid order to cease and desist, hereby affirmed and enforced, this Court retains jurisdiction of this cause to enter such further orders herein from time to time as may become necessary effectively to enforce compliance in every respect with this decree and to prevent evasion thereof.

STERRY R. WATERMAN,
THURGOOD MARSHALL,
United States Circuit Judges.

Dated: February 9, 1962

APPENDIX "D"

Supreme Court of the United States

No. ———————, October Term, 1961

ART NATIONAL MANUFACTURERS DISTRIBUTING CO., ET AL., *Petitioners*,

vs.

FEDERAL TRADE COMMISSION.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing petition for writ of certiorari in the above entitled cause be, and the same is hereby, extended to and including May 15, 1962.

JOHN M. HARLAN,
Associate Justice of the Supreme Court of the United States.

Dated this 27th day of April, 1962.

APPENDIX "E"

15 U.S.C.A. 45(a). Unfair methods of competition un

lawful; prevention by Commission—Declaration of unlawfulness; power to prohibit unfair practices

(a) Unfair methods of competition in commerce, and unfair, or deceptive acts or practices in commerce, are declared unlawful.

The Commission is empowered and directed to prevent persons, partnerships, or corporations, except banks, common carriers subject to the Acts to regulate commerce, air carriers and foreign air carriers subject to chapter 9 of Title 49, and persons, partnerships, or corporations subject to sections 181-203, 205-228 and 229 of Title 7, except as provided in section 227 of Title 7, from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.

APPENDIX "F"

15 U.S.C.A. 45(b)

(b) Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation, a complaint stating its charges in that respect and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person, partnership, or corporation so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the Commission requiring such person, partnership, or corporation to cease and desist from the violation of the law so charged in said complaint. Any person, partnership, or corporation may make application, and upon good cause shown may be allowed by the Commission to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the Commission. If upon such hearing the Commission shall be of the opinion that the method of competition or the act or practice in question is prohibited by sections 41-46 and 47-58 of this title, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or corporation to cease and desist from using such

method of competition or such act or practice. Until the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, or, if a petition for review has been filed within such time then until the transcript of the record in the proceeding has been filed in a circuit court of appeals of the United States, as hereinafter provided, the Commission may at any time upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section. After the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, the Commission may at any time, after notice and opportunity for hearing, reopen and alter, modify, or set aside, in whole or in part, any report or order made or issued by it under this section, whenever in the opinion of the Commission conditions of fact or of law have so changed as to require such action or if the public interest shall so require: Provided, however, that the said person, partnership, or corporation may, within sixty days after service upon him or it of said report or order entered after such a reopening, obtain a review thereof in the appropriate court of appeals of the United States, in the manner provided in subsection (c) of this section.

APPENDIX "G"

5 U.S.C.A. 1004(c)

Authority and functions of officers and employees

(c) The same officers who preside at the reception of evidence pursuant to Section 1006 of this title shall make the recommended decision or initial decision required by section 1007 of this title except where such officers become unavailable to the agency. Save to the extent required for the disposition of ex parte matters as authorized by law, no such officer shall consult any person or party on any fact in issue unless upon notice and opportunity for all parties to participate; nor shall such officer be responsible to or subject to the supervision or direction of any officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency. No officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency in any case shall, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to Section 1007 of this title ex-

cept as witness or counsel in public proceedings. This subsection shall not apply in determining applications for initial licenses or to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; nor shall it be applicable in any manner to the agency or any member or members of the body comprising the agency.

APPENDIX "H"

5 U.S.C.A. 1006(a)

(a) There shall preside at the taking of evidence (1) the agency, (2) one or more members of the body which comprises the agency, or (3) one or more examiners appointed as provided in this chapter; but nothing in this chapter shall be deemed to supersede the conduct of specified classes of proceedings in whole or part by or before boards or other officers specially provided for by or designated pursuant to statute. The functions of all presiding officers and of officers participating in decisions in conformity with Section 1007 of this title shall be conducted in an impartial manner. Any such officer may at any time withdraw if he deems himself disqualified; and, upon the filing in good faith of a timely and sufficient affidavit of personal bias or disqualification of any such officer, the agency shall determine the matter as part of the record and decision in the case.

APPENDIX "I"

5 U.S.C.A. 1006(c)

(c) Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof. Any oral or documentary evidence may be received, but every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence and no sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative, and substantial evidence. Every party shall have the right to represent his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule-making or determining claims for money or benefits or applications for initial licenses any agency may, where the interest of any party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

APPENDIX "J"

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

DOCKET NO. 7286

In the Matter of

ART NATIONAL MANUFACTURERS DISTRIBUTING CO., INC., a corporation, LOUIS WATCH COMPANY, INC., a corporation, and LOUIS FRIEDMAN, MARTIN FRIEDMAN, and ALBERT FRIEDMAN, individually and as officers of said corporations.

INITIAL DECISION

EDWARD CREEL, *Hearing Examiner.*
HARRY E. MIDDLETON, JR., *for the Commission.*
B. PAUL NOBLE, Washington, D. C., *for the Respondents.*

This proceeding is based upon a complaint brought under §5 of the Federal Trade Commission Act, charging respondents with the use of unfair and deceptive acts and practices and unfair methods of competition in commerce in connection with the sale and distribution of various items of merchandise, including watches.

This proceeding is now before the Hearing Examiner for final consideration upon the complaint, answers thereto, testimony and other evidence, proposed findings of fact and conclusions of law filed by all parties. The Hearing Examiner has given consideration to the proposed findings of fact and conclusions submitted, and all findings of fact and conclusions proposed by the parties, not hereinafter specifically found or concluded, are herewith rejected. The motion to dismiss the complaint filed by the respondents is denied.

The Hearing Examiner, having considered the entire record herein, makes the following findings as to the facts,

and conclusions drawn therefrom; and issues the following order:

FINDINGS OF FACT

1. Respondents Art National Manufacturers Distributing Co., Inc., hereinafter referred to as "Art National", and Louis Watch Company, Inc., hereinafter referred to as "Louis Watch", are corporations organized, existing and doing business under and by virtue of the laws of the State of New York. Their offices and principal places of business are, respectively, 58-40 Borden Avenue, Maspeth, New York, and 580 Fifth Avenue, New York, New York.

2. Respondents Louis Friedman, Martin Friedman and Albert Friedman are officers of said corporations. The individual respondents have participated in the formulation, direction and control of the policies, acts and practices of the corporate respondents, and have cooperated in carrying on the practices hereinafter found, except that respondent Martin Friedman has not been shown to have participated in the conduct of the affairs of Louis Watch, although he was nominally an officer of that corporation.

3. The respondents are engaged in interstate commerce.

4. Respondents are in competition with other catalog merchandisers and watch importers.

5. Art National publishes catalogs, circulars and other printed material, and such material is disseminated in commerce.

6. Art National represented that it has been in business for thirty-two years. Art National, however, was organized and incorporated in 1951.

7. Louis Watch represented that it was established in 1904, but this firm was not organized and incorporated until 1932.

8. The corporate respondents impliedly represented that the buildings depicted in their advertising were entirely occupied by them, when in fact each of them occupied only a small portion of the buildings depicted in their advertising.

9. Art National represented that it sold its merchandise at America's lowest prices. However, competitors of Art National sold many of the same items of merchandise at prices as low as those of this respondent, and respondent, in many instances, did not sell at wholesale prices.

10. Louis Watch represented that its watches were Gold Medal Award winners, but its watches have never been awarded a gold medal or any other kind of medal.

11. Louis Watch represented that the jewels in its watches were rubies. The jewels in Louis Watches were not rubies, but were made of synthetic material.

12. Louis Watch represented that certain of its watches were shockproof, but they were not shockproof.

13. Louis Watch represented that its watches carried a "full year's written guarantee", but the written guarantee furnished Louis Watch purchasers, against "any original defects or workmanship", did not set out the manner in which the guarantor would perform, nor was such disclosure made in the Louis Watch advertisements.

14. The evidence does not establish whether or not the suggested resale prices with which respondent Louis Watch pre-ticketed its watches were the prices at which such watches were usually and customarily sold at retail. Those sold by Art National through its catalog were sold for substantially less than Louis Watch's pre-ticketed prices, and a number of peddlers, discount dealers and wholesalers sold them at retail for less than the pre-ticketed prices; but all of the retailers who operated retail jewelry stores, who were called as witnesses, sold them at the suggested resale or pre-ticketed prices. The evidence does not permit a determination that the usual or customary resale prices were less than the pre-ticketed prices, nor does it permit a determination that the pre-ticketed prices were fictitious.

Conclusions

The allegations of the complaint relating to the pre-

ticketing of watches with fictitious retail prices have not been sustained by the evidence.

The other acts and practices of respondents, as hereinabove found, were all to the prejudice and injury of the public and of respondents' competitors, and constituted unfair and deceptive acts and practices and unfair methods of competition in commerce within the intent and meaning of the Federal Trade Commission Act.

Order

IT IS ORDERED that respondent Art National Manufacturers Distributing Co., Inc., a corporation; its officers; respondents Louis Friedman, Martin Friedman and Albert Friedman, individually and as officers of said corporation; and their agents, representatives and employees, directly or through any corporate or other device, in connection with the sale or distribution of merchandise in commerce as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or indirectly:

1. That said corporation has been in existence, or that said corporation or individuals have been in business for any period or length of time that is not in accordance with the facts;

2. That respondents occupy any portion of buildings depicted that is not in accordance with the facts, or misrepresenting, in any manner, the size or extent of the buildings in which they carry on their business;

3. That respondent Art National Manufacturers Distributing Co., Inc., sells its merchandise at America's lowest prices, or misrepresenting in any other manner its prices as compared to those of its competitors;

4. That Louis Watches are shockproof.

It Is Further Ordered that respondent Louis Watch Company, Inc., a corporation; its officers; respondents Louis Friedman and Albert Friedman, individually and as officers of said corporation; and their representatives, agents and employees, directly or through any corporate or

other device, in connection with the sale or distribution of merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or indirectly:

1. That said corporation has been in existence, or that said corporation or individuals have been in business for any period or length of time that is not in accordance with the facts; —

2. That they occupy any portion of buildings depicted that is not in accordance with the facts, or misrepresenting, in any manner, the size or extent of the buildings in which they carry on their business;

3. That Louis Watches have been awarded a Gold Medal or any other kind of medal;

4. That the jewels in Louis Watches are rubies;

5. That Louis Watches are shockproof.

EDWARD CREEL,
Hearing Examiner.

October 27, 1960.

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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 974

ART NATIONAL MANUFACTURERS DISTRIBUTING CO., LOUIS WATCH CO., ET AL., PETITIONERS

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 17–19) is reported at 298 F. 2d 476. The opinion and order of the Federal Trade Commission (Pet. 20–31) have not been officially reported.

JURISDICTION

The decree of the court of appeals, affirming and enforcing the Commission's order, was entered on February 9, 1962 (Pet. 31–33). By orders of Mr. Justice Harlan, dated April 27, 1962, and May 15,

1962, the time for filing the petition for a writ of certiorari was extended to May 16, 1962, and the petition was filed on that date. The jurisdiction of this Court is invoked under 15 U.S.C. 45(g)(2), (h), and 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether there is substantial evidence in the record to support the finding of the Federal Trade Commission that the regular retail prices of petitioners' "Louis" watches were substantially less than the prices at which they were preticketed.

2. Whether, where the original examiner died during the hearing, it was proper for the Commission to appoint a new examiner and offer petitioners an opportunity to recall all witnesses heard by the original examiner rather than to order a hearing *de novo*.

STATUTES INVOLVED

Section 5(a) of the Federal Trade Commission Act, 38 Stat. 719, as amended, 15 U.S.C. 45(a), provides in part:

> (1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful.
>
> * * * * *
>
> (6) The Commission is empowered and directed to prevent persons, partnerships, or corporations * * * from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.

Section 5(c) of the Administrative Procedure Act, 60 Stat. 239, as set forth in 5 U.S.C. 1004(c), provides:

> (c) Authority and functions of officers and employees. The same officers who preside at the reception of evidence pursuant to section 1006 of this title shall make the recommended decision or initial decision required by section 1007 of this title except where such officers become unavailable to the agency. * * *

STATEMENT

The Louis Watch Co. ("Louis") is a manufacturer and distributor of watches. Art National Manufacturers Distributing Co. ("Art National") is a mail order house which retails, and occasionally wholesales, various hard goods including Louis watches. Both corporations are entirely owned and controlled by the Friedman family. Petitioner Louis Friedman controls and directs the business activities of Louis; petitioners Albert Friedman and Martin Friedman control and formulate the policies of Art National (Pet. 24–25):

1. This litigation began when the Federal Trade Commission issued a complaint against petitioners charging that they engaged in "unfair and deceptive acts and practices and unfair methods of competition" in violation of the Federal Trade Commission Act (App. 30a).[1] The complaint alleged that petitioners'

[1] "App." and "Comm'n App." refer, respectively, to the appendices filed by petitioners and the Commission in the court of appeals.

advertisements of their Louis watches contained various false representations. (see App. 28a–29a). It also alleged as a violation petitioners' practice of "attach[ing] tickets to their Louis Watches, setting out prices, thereby representing that the prices thereon are those at which the watches * * * are usually and customarily sold at retail," when "in fact, said prices are in excess of the prices at which said watches are usually and customarily sold at retail and are fictitious" (App. 30a).[2]

During the hearing, witnesses called by the Commission testified that Louis watches were customarily sold for less than 50% of their preticketed prices by independent retailers (Comm'n App. 17a–19a, 27a–31a, 32a–35a), wholesalers (Comm'n App. 35a–36a), and others (Comm'n App. 17a–21a (auctioneers), Comm'n App. 21a–23a (sales by punchboard)), as well as by Art National—which sold "a substantial number of Louis watches * * * to consumers" (Pet. 29–30; see Pet. 9). The examiner found that although Louis watches "sold by Art National" and "a number of peddlers,

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[2] The complaint also alleged that petitioners falsely represented, by means of catalogs, the length of time Art National has been in business; the year in which Louis was established; the size of the offices in which they do business; that Art National sells "at America's lowest prices"; that Louis Watches "have been awarded a Gold Medal," contain "rubies," are "shockproof" and "carry a Full year's written guarantee" (App. 28a–29a). The Commission held that the evidence supported a finding that all but the first of these representations were false (Pet. 28–31) and ordered petitioners to cease and desist therefrom (Pet. 21–22). Petitioners do not here seek review of the enforcement by the court of appeals of this portion of the order.

discount dealers and wholesalers [were sold] at retail for less than the pre-ticketed prices," the record did not contain sufficient evidence to "permit a determination that the usual or customary resale prices were less than the pre-ticketed prices," since all of the witnesses "who operated retail jewelry stores * * * sold [Louis watches] at the suggested resale or pre-ticketed prices" (Pet. 39).[2]

On cross-appeals, the full Commission held that, although "the evidence on this point [was] conflicting" (Pet. 29), the examiner erred in refusing to order petitioners to cease preticketing their Louis watches at fictitious prices (Pet. 30). The Commission noted that the evidence showed that "a substantial number of Louis watches [were] sold to consumers through the medium of the Art National catalog" (Pet. 29), which was "distributed to more than 400,000 addressees" (Pet. 24); and that "the prices charged consumers by Art National * * * were substantially

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[2] The record contains evidence (Comm'n App. 24a-25a) that the Louis watches sold through retail jewelry stores at the preticketed prices were of a higher quality than the Louis watches customarily sold at retail at less than the preticketed prices by outlets other than jewelry stores. An investigator for the Trade Commission testified (Comm'n App. 25a):

> * * * I went in a number of jewelry stores located in downtown Columbus. * * * I was attempting to find some retailer who sold this [Louis] watch in order that I could establish for the record the usual and customary retail price. * * * I was told by these dealers that they did not know of anyone who sold this type of watch; that it is not a type of watch that is sold by jewelers but would probably be sold by a type of operation that would sell the cheaper type of merchandise.

below the suggester [*sic*] retail list, and corresponding ticket, price fixed by Louis" (Pet. 30). It concluded (*ibid.*):

> Under the circumstances of this matter, where one family owns and controls the entire operation, [petitioners] are in a poor position to deny that Louis watches are not pre-ticketed with fictitious prices when they themselves regularly sell the watches to all comers at prices which are only a fraction of said pre-ticketed prices.

Accordingly, petitioners were ordered to cease and desist from the practice of preticketing their "merchandise" with fictitious prices (Pet. 24, 22). On review, the Court of Appeals for the Second Circuit unanimously affirmed, holding that "[t]he record as a whole supports the Commission" (Pet. 19).

2. After hearing the testimony of the first eight witnesses for the Commission, the original examiner died and, over petitioners' objection a substitute examiner was appointed to take his place and continued the hearing (Pet. 19, 27). The new examiner presided during the testimony of the remaining Commission witnesses and the entire defense (Pet. 5) and prepared the initial decision (Pet. 37-41). At his first hearing, he informed petitioners' attorney that "if there is any specific controversy that your think should be brought particularly to my attention, I will permit you the greatest of latitude in recalling any witness that you may desire * * *. Either

for additional cross, or for further cross" (Comm'n App. 11a). Petitioners declined the offer (Pet. 19).[1]

Petitioners took an interlocutory appeal from the order appointing the substitute examiner, which was denied by the Commission (Pet. 24). The same objection was advanced and denied on appeal from the initial decision and in the court of appeals (Pet. 26–27, 19). In so ruling, the Commission held that petitioners had "totally failed to show that the substitution of hearing examiners in any way prejudiced their right to a fair trial" (Pet. 27).

ARGUMENT

The decision below is clearly correct, and the petition presents no question of general importance in the administration of the Federal Trade Commission Act.

1. "The weight to be attributed to the facts proven or stipulated, and the inferences to be drawn from them, are for the Commission to determine, not the courts." *Corn Products Refining Co.* v. *Federal Trade Commission*, 324 U.S. 726, 739; *Federal Trade Commission* v. *Standard Education Society*, 302 U.S. 112, 117. As pointed out in the Statement, *supra* at p. 4, the fact that Art National retailed a substantial number of Louis watches at prices considerably below the preticketed prices and the evidence

[1] In fact, two of the first eight witnesses retestified before the substitute examiner. Albert Friedman was recalled by the Commission and Louis Friedman also testified as the first and last of the nineteen witnesses called by petitioners (App. ii). Twenty witnesses in all were called by the Commission (App. i–ii).

that other retailers and wholesalers also consistently sold such watches for much less—less than 50%—than the preticketed prices are sufficient to support the Commission's finding that "the pre-ticketed prices were fictitious" (Pet. 29). Moreover, the Second Circuit so found (Pet. 18–19), and this Court has held "that substantiality of evidence on the record as a whole to support agency findings 'is a question which Congress has placed in the keeping of the Courts of Appeals. * * *'" *Federal Trade Commission* v. *Standard Oil Co.*, 355 U.S. 396, 401.[5]

2. Recently, several courts of appeals have upheld Commission findings that:

> Misrepresentation as to the retail value of merchandise by means of an attached, fictitious price and deception as to savings afforded by the purchase of the product at a substantially lower price than that indicated thereon constitute unfair methods of competition.

Clinton Watch Co. v. *Federal Trade Commission*, 291 F. 2d 838, 840 (C.A. 7), certiorari denied, 368 U.S. 952; *Baltimore Luggage Co.* v. *Federal Trade Commission*, 296 F. 2d 608, 610 (C.A. 4), certiorari denied, April 23, 1962, No. 780, this Term; see *Bankers Se-*

[5] Petitioners' suggestion (Pet. 3, 12) that, in the circumstances of this case, the Commission could not reverse the examiner's finding and substitute its own finding therefor is without merit. It is settled that the Commission is free to reverse findings of a hearing examiner as long as its substitute findings are based upon substantial evidence in the record. *Federal Communications Commission* v. *Allentown Broadcasting Corp.*, 349 U.S. 358, 363–364; *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 492, 496–497.

curities Corp. v. *Federal Trade Commission*, 297 F. 2d 403, 405 (C.A. 3). The instant decision is based upon the same principle and, contrary to petitioners (Pet. 7, 11), in no way conflicts with these decisions. The allegation of conflict is, at most, a request that this Court "should decide when a manufacturer's preticketed prices are fictitious" (Pet. 8; footnote omitted). However, it is settled that Section 5 of the Federal Trade Commission Act is violated by false advertising practices that mislead consumers into the belief that they are getting a bargain *when actually they are not*. *Standard Education Society*, *supra*, 302 U.S. at 116-117; see *Federal Trade Commission* v. *Winsted Hosiery Co.*, 258 U.S. 483, 492-493. And a case by case determination of what constitutes false advertising has been appropriately left to the "informed judgment" of the Commission, since it "is experienced and expert in evaluating the impact of advertising practices and in framing equitable advertising requirements that serve the public interest." *Bankers Securities Corp.*, *supra*, 297 F. 2d at 405.

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[1] Petitioners' allegation (Pet. 11) that the cease and desist order is too broad insofar as it forbids the preticketing with fictitious prices of all "merchandise" sold by them is also insubstantial. The record contains evidence that Art National sold other products besides Louis watches for less than their preticketed prices (Comm'n App. 40a) and it purchased all of its products through Louis (Comm'n App. 5a). Therefore, the Commission's proscription of fictitious preticketing practices as to all products sold by petitioners fell well within its "wide discretion" in framing the order. See *Jacob Siegel Co.* v. *Federal Trade Commission*, 327 U.S. 608, 611; *cf. Federal Trade Commission* v. *Henry Broch & Co.*, 368 U.S. 360, 363-364. In any

3. Petitioners' contention (Pet. 11–14) that the Commission erred in continuing the hearing and appointing a new examiner after the death of the original examiner runs counter to Section 5(c) of the Administrative Procedure Act, 5 U.S.C. 1004(c) (*supra*, p. 3), which makes clear that the original agency decision need not be made by the same officers who presided at the reception of evidence "where such officers become unavailable to the agency." In *Gamble-Skogmo, Inc.* v. *Federal Trade Commission*, 211 F. 2d 106, 117–118 (C.A. 8), (cited at Pet. 12), it was held that Section 5(c) did not authorize a substitute examiner, who had heard none of the testimony, to make the original decision when "it [was] clear" that his conclusion was based "in controlling measure upon the credibility evaluation which he made between the opposing witnesses in their irrecon-

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event, petitioners have waived this argument by failing to raise it before either the Commission or the court of appeals. See *Mogg Industries, Inc.* v. *Federal Trade Commission*, 355 U.S. 411, 413–414.

The original trial examiner, "before whom all of the testimony in the case had been taken, and who had had the matter duly submitted to him on briefs and oral argument, was thereafter, because of his having reached the age of 70 years * * * and having thus become subject to being automatically retired * * *, treated by the Commission as being legally unavailable * * *" (211 F. 2d at 110). The record showed that the Commission had statutory authority to reemploy the examiner and in fact had done so briefly; and that, following his separation, "he thereupon was taken on as a trial examiner by another government agency" (211 F. 2d at 111). The court, however, refused to hold that the Commission was under a duty to reemploy the examiner or that appellants were entitled to a new hearing because of its failure to do so (211 F. 2d 111–112).

cilable testimony." No such problem is presented here. As noted by the Commission (Pet. 27), petitioners did "not challenge the credibility of these witnesses [who were heard by the deceased examiner] or point to any irreconcilable conflict between their testimony and other evidence." Moreover, as the court of appeals pointed out (Pet. 19), petitioners declined to accept the new examiner's offer of an opportunity to recall any one or all of the witnesses heard by the first examiner. Therefore, they cannot now complain that they were prejudiced by the fact that the substitute examiner did not hear some of those witnesses testify.

CONCLUSION

The decision below is clearly correct and presents no substantial question. Accordingly, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 1962.

U. S. GOVERNMENT PRINTING OFFICE: 1962